LE COPY

Office-Supreme Court, U.S.
FILED
OCT 29 1959
JAMES R. BROWNING, Clerk

No. 396

In the Supreme Court of the United States

OCTOBER TERM, 1959

BERNARD GOLDFINE AND MILDRED PAPERMAN,
PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
BEATRICE ROSENBERG,
RICHARD B. SUTHERLAND,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	9
Conclusion	14

CITATIONS

Cases:	
Brown v. *United States*, 359 U.S. 41	13
Goldfine v. *Pastore*, 261 F. 2d 519	6
Green v. *United States*, 356 U.S. 165	13
Nilva v. *United States*, 352 U.S. 385	10, 13
United States v. *Bryan*, 339 U.S. 323	10
Statutes:	
Internal Revenue Code of 1954:	
Sec. 7402(b) (26 U.S.C., Sec. 7402(b))	2
Sec. 7604(b) (26 U.S.C., Sec. 7604(b))	2, 14
18 U.S.C., Sec. 401	2, 3
28 U.S.C. 144	12

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 396

BERNARD GOLDFINE AND MILDRED PAPERMAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (Pet. 1a–12a) is reported at 169 F. Supp. 93. The opinion of the Court of Appeals (Pet. 13a–22a) is reported at 268 F. 2d 941.

JURISDICTION

The judgment of the Court of Appeals was entered on July 24, 1959 (Pet. 14a), and a petition for rehearing was denied on August 14, 1959. The petition for a writ of certiorari was filed on September 11, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on the evidence before it, the District Court correctly found petitioners to be guilty of criminal contempt in willfully disobeying its order for the enforcement of an internal revenue summons.

STATUTES INVOLVED

18 U.S.C.:

SEC. 401. POWER OF COURT

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

* * * * *

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Internal Revenue Code of 1954:

SEC. 7402. JURISDICTION OF DISTRICT COURTS

* * * * *

(b) *To enforce summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

* * * * *

(26 U.S.C., Sec. 7402(b).)

Section 7604(b):

Whenever any person summoned under section 6420(e)(2), 6421(f)(2), or 7602 neglects or

refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

(26 U.S.C., Sec. 7604(b).)

STATEMENT

Petitioners were adjudged guilty of criminal contempt, in violation of 18 U.S.C. 401, for willful failure to comply with an order of the District Court requiring them to produce, at the office of the Internal Revenue Service in Boston, certain books and records of five corporations whose income tax liability was under investigation. Petitioner Goldfine was sentenced to three months' imprisonment; petitioner Paperman, to ten days' imprisonment. The Court of

Appeals for the First Circuit affirmed unanimously. (Pet. 12a, 22a; I R. 273–274.)[1]

The relevant facts as found by the District Court (Pet. 1a–12a), and as summarized by the Court of Appeals (Pet. 14a–19a), are as follows:

During the summer of 1958, agents of the Internal Revenue Service began an investigation of the tax liability of five corporations in which petitioner Goldfine had an interest: Lebanon Mills Corporation (Lebanon); Lebandale Mills, Inc. (Lebandale); George Mabbett & Sons Company (Mabbett); Strathmore Woolen Company (Strathmore); and Northfield Mills, Inc. (Northfield). (Pet. 2a, 14a.)

Goldfine was president and treasurer of Lebanon, Lebandale and Strathmore, and president of Mabbett. He had control of the records of these corporations. (Pet. 2a, 14a.) Paperman was in actual control of the records of Strathmore and Northfield. (Pet. 2a, 14a.)

On July 21, 1958, Internal Revenue Service agents served administrative subpoenas upon the five companies, calling for production of numerous corporate records and papers. The subpoenaed documents in-

---

[1] The record certified to this Court by the Court of Appeals consists of three volumes. Following petitioner's enumeration of these volumes (Pet. 2, fn. 2), we designate as I R. and III R. the record of the proceedings in the District Court and Court of Appeals following the filing of the petitions for attachment for criminal contempt. Volume II, which we designate as II R., embodies the proceedings leading up to the issuance of the District Court's order in a civil action captioned *Fred G. Pastore, Group Supervisor, Internal Revenue Service, Petitioner* v. *Bernard Goldfine and Mildred Paperman, Respondents.*

cluded the following sets of records (hereafter referred to as the "seven listed records"): The accounts receivable and payable ledgers of Lebanon for the years 1952 through 1957, of Strathmore for the years 1953 through 1957, and of Northfield for the fiscal years ending April 30, 1953, through April 30, 1957; and the cancelled checks of Strathmore for the years 1953 through 1957. (Pet. 2a–3a, 17a.)

At the request of the companies, the Service did not insist upon production at its Boston office (as required by the subpoenas), but permitted the companies to make the records available at Goldfine's Boston office. The Service began its examination of the records,[2] but at the companies' request suspended examination for 60 days, so that corporate representatives could have exclusive access to the records for the purpose of preparing and filing delinquent income tax returns. However, the Service made it clear to counsel for the companies that it was not abandoning its investigation, but was merely temporarily suspending it for the limited purpose. It also emphasized that when the examination was resumed, it would not constitute a new inspection of the records which would require new subpoenas. (Pet. 4a, 14a–15a.)

After the expiration of the 60-day period, the Service refused a request for a further extension, and tried unsuccessfully again to examine the records. On November 5, 1958, formal demand was made for the

[2] Service agents examined the records at Goldfine's office during the summer of 1958. During that period, each of the seven records was personally observed by at least one of the Service representatives. (Pet. 4a.)

Lebanon, Lebandale and Strathmore records. Petitioner Goldfine stated that the accountants were working on the books. The Service agent then talked to petitioner Paperman about examining other corporate records, and received a similar answer. (Pet. 5a, 15a.)

On December 3, 1958, the Service filed in the district court a petition for judicial enforcement of the administrative subpoenas previously issued. On December 5, 1958, after a hearing, the court issued an "Interim Order," which directed petitioners to produce some, but not all, of the documents covered by the subpoenas.[3] It did cover the seven listed records. Production was directed to be made at the Boston office of the Service by Monday, December 8, 1958. (Pet. 4a–6a, 15a.)

Petitioners sought a stay of the interim order from the Court of Appeals for the First Circuit, but the latter denied it on the ground that the interim order was interlocutory and therefore nonreviewable. *Goldfine* v. *Pastore*, 261 F. 2d 519. The court, however, extended petitioners' time for compliance with the interim order until 3 p.m. Monday, December 8th.

---

[3] The District Court did not direct production of (1) records relating to all tax years with respect to which petitioners contended that the taxing authorities had already completed an audit while the documents were previously available for their inspection, and (2) records relating to any tax years with respect to which petitioners contended that, absent fraud, the statute of limitations would apply. In addition, the District Court eliminated from the Government's proposed order a request for the "stock certificate book" and other unspecified documents of each corporation. (Pet. 15a–16a.)

Petitioners delivered approximately 1300 pounds of material to the Service at that time, and some minor items in the next few days. However, they did not deliver the seven listed records to the Service until 1:30 p.m. on Thursday, December 18, 1958. They made this delivery only after their counsel had first offered the seven records as exhibits at the contempt hearing before the District Court (which began on December 16, 1958), and the court had pointed out that such production was not in compliance with the interim order, which required delivery to the Service (Pet. 5a–6a).

On December 10, 1958, the United States Attorney filed petitions for attachment for criminal contempt against both petitioners. Petitioner Goldfine was charged with willful disobedience of the interim order by failing to produce the records of Lebanon, Lebandale and Mabbett (counts I, II and III, respectively); petitioner Paperman was charged with willful failure to produce the records of Strathmore and Northfield (counts I and II, respectively). (Pet. 6a–7a, 16a–17a.)

After hearing, the District Court (Judge Wyzanski) found petitioner Goldfine guilty on count I (relating to the Lebanon records), but not guilty on counts II and III; and petitioner Paperman guilty on both counts. (Pet. 12a.).

The District Court found that the Government had proved beyond a reasonable doubt the six elements of the crime of criminal contempt: (1) that the interim order adequately described the time and place for

production; (2) that petitioners had control over the records; (3) that they had been served with the production order; (4) that the records existed when the order was served; (5) that the records were not produced at the Boston office of the Service by the December 8, 1958, deadline; and (6) that such non-production was willful. (Pet. 9a–10a.) The court ruled (Pet. 10a) that "the Government proved willfulness in several ways." It stated (*ibid.*) that each petitioner knew in August 1958 of the existence of the record "which he or she was commanded to produce"; that he or she had reported to an agent in November 1958 that the record was being worked on by accountants; and that he or she knew that such records were kept in Goldfine's Boston office. It concluded (*ibid.*) that "Failure to produce promptly such a known and readily reached record is willful defiance."

The court further ruled that it was immaterial that petitioners had supplied other records, since they were not so continuously engaged in doing so as to prevent their producing the seven listed records; that it was not "any excuse" that the exhibits containing the seven listed records also contain other records "irrelevant to this case"; and that there was "no showing that either defendant had, in the words of Rule 17(g), Federal Rules of Criminal Procedure, 'adequate excuse' for his or her failure to comply with this Court's Interim Order of December 5 to produce the seven listed records." (Pet. 10a–11a.) It noted (Pet. 18a) that "the government does not have the burden of negativing all possible excuses for noncompliance with a court order."

In affirming, the Court of Appeals held (Pet. 14a), in an opinion by Judge Magruder, that it was "unable * * * to find any substance in appellants' contentions."

ARGUMENT

Contrary to petitioners' contention (Pet. 15), this case does not raise any "fundamental questions respecting the exercise of the criminal contempt power by the federal courts." It involves only the application of settled principles to the facts of this case. The District Court's adjudication that petitioners had willfully disobeyed the production order rested upon careful and detailed findings, and the Court of Appeals carefully reviewed petitioners' attacks on their conviction and found them not to have "any substance" (Pet. 14a). Accordingly, there is no occasion for further review by this Court.

1. Petitioners contend (Pet. 18–21) that the Government failed to prove that their non-compliance with the production order was willful. They do not deny, however, that they were aware of the existence, and had control, of the records which they were directed to produce; that they could have produced them on December 8, 1958 (as they produced so many other documents); that they failed to produce them until 10 days later; and that they offered no justification for such failure. Moreover, they concede (Pet. 18) that the Court of Appeals correctly held (Pet. 18a–19a) that "It is enough to make out a prima facie case for the government to show, as the government did below, that the appellants, in response to the interim court order calling for the production of corporation

records, refused to surrender them when they were in existence and within their control." (See *United States* v. *Bryan*, 339 U.S. 323, 330; *Nilva* v. *United States*, 352 U.S. 385, 392.) They contend (Pet. 18), however, that the rule is not here applicable, because they did not "refuse" to deliver the documents, but only delayed doing so.

But the order directed production on a stated date, and petitioners' unexplained and unjustified non-compliance was no less willful because, after they had been cited for contempt, they belatedly produced the documents. Whether non-compliance is willful depends upon the facts of the particular case and, as the court below pointed out (Pet. 18a), "Willfulness almost necessarily has to be proved as an inference from circumstantial evidence". Here the Government established all the necessary elements of willful disobedience of a court order (see *supra*, pp. 4–8). Petitioners made no attempt to justify their non-compliance, either by showing impossibility, undue burden, or any of the other possible excuses therefor referred to by the District Court (Pet. 3a–4a). Indeed, the trial court expressly warned, when it issued the interim order, that petitioners would be held accountable in contempt proceedings if they failed to comply (Pet. 5a). While it is true that petitioners produced the bulk of the material covered by the interim order, the records not produced—ledgers showing accounts payable and receivable, and cancelled corporate checks—might well have been the crucial documents for determining whether any of the companies had violated the Internal Revenue laws.

On this record, as the Court of Appeals held (Pet. 18a), petitioners' non-compliance stands as a clear case of willful disobedience.

2. There is no substance to petitioners' argument (Pet. 21–23) that the interim order was illegal because it afforded insufficient time for compliance. Petitioners made no attempt to seek modification of the order to allow additional time for compliance, either before the compliance date or, indeed, up to the time of trial.[4] Furthermore, there is nothing which shows, or even suggests, that petitioners could not have produced the seven listed records by October 8, 1958. These books and records had originally been designated in the administrative subpoenas served in August 1958, four months prior to the production order. Petitioners' own representatives, with the concurrence of the Service, had been permitted to use the books undisturbed for a two-month period, after which the Service attempted unsuccessfully to resume its examination. Petitioners delivered some 1300 pounds of books and records to the Service on December 8, 1958, as directed by the interim order. (Pet. 6a.) They withheld seven sets of records which were readily available in Goldfine's Boston office when the interim order was issued[5] and were under their control (Pet. 2a).

[4] After the Government had rested at the criminal contempt trial, petitioners stated (I R. 216) that they intended to move the court to "modify to a certain extent" the interim order. The trial court pointed out that although such a modification might affect petitioners' liability for civil contempt, it could not alter "whatever criminal liability may or may not exist." (I R. 217.)

[5] Petitioners refer to (Pet. 9) Miss Paperman's statement to the agents in the summer of 1958 that "many of the documents

Accordingly, the Court of Appeals was fully warranted in concluding (Pet. 19a) that it is "difficult to believe" that if petitioners "could cause the production of the records in the courtroom on December 18 * * * they had no power to produce them a few days earlier at the office of the Internal Revenue Service"—as, in fact, they produced the bulk of the documents covered by the interim order.

3. Petitioners urge (Pet. 23–32) that they were denied a fair trial because the trial judge had formed an unfavorable opinion of petitioners from prior unrelated cases, and had been embroiled with petitioner Goldfine "in a public dispute" (Pet. 28) several months before the trial. But petitioners made no motion (under 28 U.S.C. 144) to disqualify the trial judge for bias and prejudice, and such failure is not justified by their present assertion (Pet. 31) that such a "motion would in any event have been futile." Moreover, as the Court of Appeals pointed out (Pet. 22a), the primary ground upon which petitioners predicate their claim of prejudice—the court's statements in passing sentence—"cannot serve as the basis for any charge or prejudice." In these circumstances, the Court of Appeals correctly held (Pet. 22a) that the district judge had not "committed an

---

were scattered throughout the files * * * and had to be collected". This statement, however, related only to supporting vouchers (I R. 85, 90–91, 96), which had nothing to do with the seven listed records. Similarly, petitioners' statement (Pet. 9) that some of the records covered by the interim order were located outside of Boston ignores the fact that none of the seven listed records was so located.

abuse of discretion in failing to disqualify himself on his own motion."

4. Petitioners urge (Pet. 32–34) that the trial court was precluded from finding willfulness because their counsel stated at the contempt hearing that he had determined the time, place and manner of production of the seven listed records. The Court of Appeals fully answered this contention when it pointed out (Pet. 19a): "But that was only suggestion, and although the district court twice commented that the defendants had offered no evidence to support that suggestion, counsel neither took any action, made any reply, nor sought to reopen the case."

5. Finally, petitioners contend (Pet. 34–36) that their conviction of criminal contempt by the court denied them their constitutional right to trial by jury and indictment by grand jury. However, "The statements of this Court in a long and unbroken line of decisions involving contempts ranging from misbehavior in court to disobedience of court orders establish beyond peradventure that criminal contempts are not subject to jury trial as a matter of constitutional right"; and "this Court has never suggested that * * * [the] protections * * * [traditionally surrounding contempt proceedings] * * * included the right to grand jury indictment." *Green* v. *United States*, 356 U.S. 165, 183, 184. Cf. *Nilva* v. *United States*, *supra*; *Brown* v. *United States*, 359 U.S. 41.

The fact that refusal to obey the Service's administrative subpoena is a misdemeanor is immaterial. Petitioners were not tried and convicted for that

offense, but for the offense of criminal contempt. Section 7604(b) of the Internal Revenue Code of 1954 specifically provides for judicial enforcement of Service subpoenas, and authorizes the judge "to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience."

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

MEYER ROTHWACKS,
RICHARD B. BUHRMAN,
Attorneys.

OCTOBER 1959.

U.S. GOVERNMENT PRINTING OFFICE 1959

FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 5 1959
JAMES R. BROWNING, Clerk

No. 396

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

BERNARD GOLDFINE and MILDRED PAPERMAN,
Petitioners

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF BY PETITIONERS TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

THURMAN ARNOLD
ABE KRASH
1229 19th Street, N. W.
Washington 6, D. C.

HAROLD ROSENWALD
85 Devonshire Street
Boston, Massachusetts

Attorneys for Petitioners

Of Counsel:

ARNOLD, FORTAS & PORTER
1229 19th Street, N. W.
Washington 6, D. C.

BURTON L. WILLIAMS
85 Devonshire Street
Boston, Massachusetts

Dated: November 5, 1959

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
The Issues Presented	1
The Burden of Proving Wilfulness	2
Government's Failure to Show Improper Motive	5
Government's Failure to Justify Arbitrary Timetable of District Court	6
Government's Silence with Respect to Production of the Seven Records at Beginning of Trial	7
Government's Avoidance of Jury Trial Issue	7
The Judgment of the Court of Appeals is Void Because a Non-Qualified Judge Participated in the Judgment	8

CITATIONS

Cases:

Berkshire Employees Ass'n. v. National Labor Relations Board, 121 F. 2d 235 (3rd Cir.)	10
Brady v. United States, 243 F. 2d 378 (1st Cir. 1957)	8
Ford Motor Co. v. Department of Treasury, 323 U. S. 459	11
Green v. United States, 356 U. S. 165	2, 8
Mitchell v. Maurer, 293 U. S. 237	11
Narragansett Racing Ass'n. v. Kiernan, 59 R. I. 90, 194 A. 692	10
Nilva v. United States, 352 U. S. 385	2
United States v. American-Foreign Steamship Corp., et al, No. 138, certiorari granted, October 13, 1959	1, 10, 11, 12

Statutes:

26 U.S.C. § 7210	8
28 U.S.C. § 43	9, 11
28 U.S.C. § 46	10
28 U.S.C. § 294	9, 11
28 U.S.C. § 295	9, 11
28 U.S.C. § 296	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 396

BERNARD GOLDFINE and MILDRED PAPERMAN,
Petitioners

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF BY PETITIONERS TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI*

I

1. The Issues Presented. The Government, in its Brief in Opposition, seeks to brush aside the serious

* In lieu of filing a separate memorandum, we are incorporating in this reply brief a separate section, p. 8, *infra*, concerning a defect in the jurisdiction in the Court of Appeals (the participation in the proceeding by a non-qualified judge) which renders the judgment void. The facts came to the attention of Petitioners after the petition for certiorari was filed. The issue is related to the question presented to this Court by the Solicitor General in No. 138, *United States* v. *American-Foreign Steamship Corp., et al.*, in which certiorari was granted on October 13, 1959.

issues presented by comparing this case to a commonplace criminal proceeding. Thus, the Government argues that the petition "involves only the application of settled principles to the facts of this case" (Opp. Br. 9). But the Government cites no case involving contempt with respect to an order for production, and we are aware of none, involving circumstances remotely similar to those presented here. This contempt conviction is a declaration that criminal defiance of a court may be inferred from the mere fact of delay in producing a handful out of a mass of corporate records required to be produced within forty-eight hours, and even though the few records on which the conviction was based were brought to court by the contemnors themselves at the beginning of the trial. Compare *Nilva* v. *United States*, 352 U.S. 385.

Moreover, criminal contempt proceedings for disobedience of an order to produce do not typically involve the extraordinary and serious issues respecting the impropriety of adjudication by the District Judge which are presented by the record in this case. In addition, this is the first case to present the question, reserved by this Court in *Green* v. *United States*, 356 U.S. 165, where the underlying conduct deemed to constitute a contempt would also be punishable as a substantive crime. (See Pet. 34-36.)

2. **The Burden of Proving Wilfulness.** In its Brief in Opposition, the Government vacillates between the legal argument that wilfulness may be established from the mere fact of delay in producing these voluminous records and the factual contention that there is sufficient evidence in the record to show an intent to defy the court.

The issue of wilfulness does not raise a mere question of sufficiency of evidence, as the Government suggests. Rather it raises a question of the burden of proof in a special kind of criminal case, where a judge is the sole arbiter of the issue whether his own order has been wilfully disobeyed. Echoing the two opinions of the courts below, which are now under attack, the Government assumes that failure to obey any court order to produce documents within the time allowed is wilful, unless justification is shown for such failure (Opp. Br. 9-10). Thus, the Government would relieve itself of the prosecution's burden of proving wilfulness and cast upon the defendant the burden of proving lack of wilfulness. If we have correctly stated the issue, it is difficult to conceive of a more critical question in the area of criminal procedure in the federal courts.

The Government argues: "They (i.e., petitioners) withheld seven sets of records which were readily available in Goldfine's Boston office when the interim order was issued and were under their control" (Opp. Br. 11.) Petitioners did not withhold the seven records nor any other records. They turned over every record called for by the Order. Surely in the circumstances of this case, the delay in producing seven particular documents can not be construed as wilful defiance in the absence of some proof of improper motive.

The core of the Government's argument is the contention that petitioners were guilty of "unexplained and unjustified non-compliance" (Opp. Br. 10). And again, that "Petitioners made no attempt to justify their non-compliance, either by showing impossibility, undue burden, or any of the other possible excuses therefor referred to by the District Court" (*Ibid*).

But the record shows clearly that the delay in delivery of these seven records was both explained and justified. With respect to the seven records, petitioners' trial counsel told the District Court as follows (Vol. I, 202-203):

> "Mr. Kelleher: The interim order ordered delivery of certain years and certain years only; and when I have a chance to be heard fully on this matter, I think I will show your Honor that it was not possible to comply with the order with the documents in their present form. Copies would have to be made either by transcription or photostat, and *it was impossible to comply with your Honor's order in the time allotted.*
>
> "The Court: Well, I understand the argument and it need not be elaborated." (emphasis supplied)

In short, the seven records, unlike the hundreds of records turned over by petitioners on December 8 and thereafter, contained material not called for by the order to produce. Rightly or wrongly, petitioners' trial counsel believed that he was entitled to solicit a suggestion from the District Court as to the mechanics for segregating irrelevant material. Failing to get that suggestion, he promptly delivered the documents in their original form to the Internal Revenue Service with the irrelevant material included. (See Findings of District Court, Pet. p. 6a, para. 15; *Id.*, p. 7a, para. 20.) The Government in its brief simply ignores this critical episode at the trial.

The record thus affirmatively shows that any delay was the result of advice of counsel. Certainly, this is a valid excuse for the time and manner of the production of documents. In any event, the record belies the Government's sweeping claim (Opp. Br. 11) that

"there is nothing which shows, or even suggests that petitioners could not have produced the seven listed records by December 8, 1958". In trial counsel's words, *supra*, "It was impossible to comply with your Honor's order in the time allotted."

3. **Government's Failure to Show Improper Motive.** In its frantic search for circumstantial evidence to support its claim of wilful defiance, the Government goes to the following extreme of speculation and surmise. It states (Opp. Br. 10):

> "While it is true that petitioners produced the bulk of the material covered by the interim order, the records not produced—ledgers showing accounts payable and receivable, and cancelled corporate checks—*might well have been the crucial documents for determining whether any of the companies had violated the Internal Revenue laws.*" (emphasis supplied)

The last part of this sentence is a reckless effort by the Government to sustain petitioners' conviction by libelous innuendo. The Government's charge that petitioners "might well" have been concealing evidence is without basis in the record. These same documents had been examined by the Government (see Opp. Br. 5, n. 2), and Goldfine knew that such examination had been made. The Government did not ask petitioners to give these seven records priority in delivery over any others. Had the Government been able to assert at the trial that the documents were of particular importance, it could easily have done so and thus bolstered up immeasurably the flimsy case that was actually presented. There was no showing that petitioners had any improper motive for withholding these few records while producing all of the others. The inference is inescap-

able that they were not of crucial importance. For the Government to stay silent at the trial and then put this charge of concealing evidence on the public record of a *cause célèbre* justifies, we think, our emphatic protest.

4. **Government's Failure to Justify Arbitrary Timetable of District Court.** The Government does not advance any explanation or justification in its brief for the extraordinary timetable of the proceedings below. The Internal Revenue Service filed its petition for enforcement on Wednesday, December 3, 1958 (Vol. II, 3). Government counsel himself advised the District Court that it "has been our uniform practice" to afford "ten days notice", i.e., petitioners could not have been required to respond to an order to show cause until December 14, 1958 (Vol. II, 4-5). The District Judge, however, stating that "I have reasons for Friday" (Vol. II, 5), entered an order returnable *two* days later, on Friday, December 5, 1958 (*Ibid.*). At the conclusion of the hearings on Friday, the District Judge signed the "Interim Order" which required petitioners to produce the voluminous books and records involved by noon on Monday, December 8, 1958 (Vol. II, 110). The order was served upon petitioners the following day, Saturday, December 6, 1958 (Vol. I, 8-9, 17).

The Government does not even seek to defend the precipitate speed of the District Judge. Under any circumstances, an order requiring the production of a mass of corporate records within 48 hours, including Saturday and Sunday, would be deemed onerous and oppressive. We submit that the timing was not only so arbitrary that it nullifies the legality of the Interim Order (Pet. 21-23), but we also respectfully state that it is relevant in considering whether the District Judge

satisfied the standards of impartiality which are requisite in a case involving a charge that the accused has defied an order issued by the presiding judge himself.

5. **Government's Silence with Respect to Production of the Seven Records at Beginning of Trial.** The Brief in Opposition makes no reference to a most important fact which conclusively disproves any intent to defy the court. At the beginning of the trial on December 16, 1958, the District Judge stated that he would not "punish for criminal contempt a failure to deliver on the 8th if a delivery had taken place *by you*" (Vol. I, 77). At the very time the Court made that statement, the seven documents had been brought to court by petitioners' counsel for the purpose of compliance (see Vol. I, 156, 158). The fact was not called to the attention of the trial court until later in the proceedings. But the District Court did know before finding petitioners guilty that the documents had been produced, and that the time, manner and place of their production were the sole responsibility of counsel and not of petitioners.

The Court of Appeals refused to consider the affidavit of counsel for petitioners reciting these facts (R. 624-625). But the Government has made no objection to the consideration of that affidavit here. And on the basis of that affidavit any inference of wilful defiance of the court with respect to these documents is completely destroyed.

6. **Government's Avoidance of Jury Trial Issue.** The Government sidesteps the constitutional issue presented (Opp. Br. 13). The question presented by the record is not whether there is a right to trial by jury in every criminal contempt case. The issue is presented

here in a much narrower compass. Congress expressly declared that refusal to obey an Internal Revenue summons is a criminal offense (26 U.S.C. § 7210). In a prosecution for this offense, a defendant is entitled to a jury trial (*Brody* v. *United States*, 243 F. 2d 378, 381 (1st Cir. 1957)). The question thus presented here is, where Congress has provided a criminal sanction for certain conduct, and where a party would be entitled to a jury trial in any prosecution involving such conduct, may the right to trial by jury be denied by a contempt proceeding? That question, expressly left open by this Court in *Green* v. *United States*, 356 U.S. 165, is raised in the present case.

II

THE JUDGMENT OF THE COURT OF APPEALS IS VOID BECAUSE A NON-QUALIFIED JUDGE PARTICIPATED IN THE JUDGMENT.

1. At the time the petition for certiorari was filed in the present case, petitioners were unaware of facts appearing from the records of the Court of Appeals which we believe show that Judge Magruder was not qualified to sit or act as a member of the court. The relevant facts are set out in detail in the margin.[1] As

[1] This case was orally argued before the Court of Appeals on May 13, 1959. The Court of Appeals at that time consisted of Chief Judge Magruder and Circuit Judges Woodbury and Hartigan. Thereafter Chief Judge Magruder retired from the court, his retirement being effective on June 12, 1959. The judgment of the Court of Appeals affirming the judgment of the District Court was entered on July 24, 1959 (R. 623). The opinion of the Court of Appeals, issued on the same date (Pet. App. 14a), was written by Judge Magruder whose name appears at the head of the opinion as "Magruder, Circuit Judge (Retired)" (see 268 F. 2d 943). The records of the Court of Appeals disclose that at no time following his retirement was Judge Magruder designated or assigned either by the Chief Judge of the Court of Appeals for the First

we note, Judge Magruder participated in the decision and wrote the only opinion of the court, which was adverse to petitioners. His lack of qualification arose from the fact that he retired after oral argument in this case but before the opinion was filed and the judgment was entered. Subsequent to his retirement he was never lawfully designated or assigned to sit as a member of the court. The applicable statute, 28 U.S.C. § 295, expressly requires that "all designations and assignments of * * * judges shall be filed with the clerks and entered on the minutes of the courts from and to which made." The Clerk of the Court of Appeals for the First Circuit has informed counsel that no designation or assignment was filed and that none was entered on the minutes of the Court. Therefore, the decision of the court below consists in a judgment concurred in by two active judges and a retired judge not designated or assigned according to law.

2. We submit that the judgment by the Court of Appeals is void under the clear language of the controlling statutes.

Judge Magruder's participation contravenes the the plain terms of 28 U.S.C. § 294(c) which provides that "No retired justice or judge shall perform judicial duties except when designated and assigned." Under 28 U.S.C. § 43(b), a "court of appeals shall consist of the circuit judges of the circuit in active service." Retired judges who are "designated or assigned" within the circuit by the chief judge or judi-

Circuit or by the Judicial Council of the First Circuit to act as a judge of the Court of Appeals for that Circuit (see 28 U.S.C. §295). It may also be noted that Judge Magruder as well as Judges Woodbury and Hartigan participated in the decision of the Court of Appeals denying appellants' petition for rehearing on August 14, 1959 (R. 626).

cial counsel of the circuit in accord with 28 U.S.C. §§294, 295, are competent to sit as judges on a court or division of not more than three judges, but a judge who has not been so designated or assigned is precluded from "perform[ing] judicial duties". Since Judge Magruder was not designated or assigned, following his retirement on June 12, 1959, in conformity with these provisions, he was not qualified to write the opinion of the court or to participate in the decision, in the judgment, or in the proceedings on petitioners' application for a rehearing.

It cannot be argued that Judge Magruder's unauthorized presence was immaterial because under 28 U.S.C. § 46(d) a majority of the judges authorized to constitute a court may constitute a quorum. The participation of a non-qualified judge vitiates the entire proceeding and renders the judgment void. This is true because litigants are entitled to an opinion and judgment by qualified judges only. Cf. *Berkshire Employees Ass'n.* v. *National Labor Relations Board*, 121 F. 2d 235, 239 (3rd Cir.) (there is no way to measure influence of nonqualified judge upon qualified judges); see also *Narragansett Racing Ass'n.* v. *Kiernan*, 59 R. I. 90, 114, 194 A. 692, 701-702 (participation of disqualified member "vitiated the decision, though supported by a majority without counting him"). We do not believe a judicial decision is valid which consists solely in the concurrence of two active judges with an opinion reasoned out and written by a person not authorized to sit as a judge.

3. On October 13, 1959, subsequent to the filing of the petition for certiorari in the present case on September 11, 1959, this Court entered an order granting certiorari in *United States* v. *American-Foreign Steamship Corp. et al* (No. 138). The petition for certiorari

submitted by the Solicitor General in that case presents a jurisdictional question related to the issue arising from the jurisdictional facts we have noted above. In *American-Foreign Steamship Corp.*, the Government has urged this Court to decide "whether a circuit judge who retires prior to the decision of a court of appeals sitting on rehearing *en banc* is an 'active' circuit judge entitled to participate in the *en banc* decision under 28 U.S.C. 46(c)." (Petition for Certiorari, p. 2, *United States* v. *American-Foreign Steamship Corp. et al.*). The question presented here is whether, consistently with 28 U.S.C. §§ 43, 294, and 295, a circuit judge who retires prior to the decision by the Court of Appeals is qualified to participate in the decision and to write the opinion of the Court in the absence of any designation or assignment. In the light of the order by this Court granting the petition in No. 138, we believe it incumbent upon us to inform the Court that there is a jurisdictional defect in this case closely related to the one that will be argued in the *American-Foreign Steamship Corp.* case.[2]

In his petition in *American-Foreign Steamship Corp. et al.*, *supra*, the Solicitor General himself acknowledges that a formal designation under 28 U.S.C. § 296 is required to authorize a retired judge to sit. The Solicitor General represents to this Court as follows (Pet. for Cert., pp. 10-11):

> "Moreover, the powers conferred on retired judges under 28 U.S.C. 296 are solely those conferred by the Chief Judge of the circuit. Following his retirement, Judge Medina did not receive a designa-

[2] Questions involving the jurisdiction of the lower court will be considered here even though urged for the first time in this Court. *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 467. This Court will on its own initiative consider defects in the jurisdiction of the lower courts. *Mitchell* v. *Maurer*, 293 U.S. 237, 244.

tion and assignment in this case. Plainly, Chief Judge Clark did not purport in any way to invest Judge Medina with the power to participate in the *en banc* decision."

The Solicitor General also maintains (and we believe correctly) that "The issue is one of statutory interpretation; it is not a matter of discretion." (Pet. for Cert., p. 7, *United States* v. *American-Foreign Steamship Corp. et al.*) The foregoing contentions by the Solicitor General apply precisely to the present case.

We submit that the judgment by the Court of Appeals is void because rendered by an improperly constituted court, that certiorari should be granted, and the judgment should be reversed.

Respectfully submitted,

THURMAN ARNOLD
ABE KRASH
1229 19th Street, N. W.
Washington 6, D. C.

HAROLD ROSENWALD
85 Devonshire Street
Boston, Massachusetts
Attorneys for Petitioners

Of Counsel:

ARNOLD, FORTAS & PORTER
1229 19th Street, N. W.
Washington 6, D. C.

BURTON L. WILLIAMS
85 Devonshire Street
Boston, Massachusetts

Dated: November 5, 1959